

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

ERICSSON INC., et al.,

Plaintiffs,

vs.

D-LINK CORPORATION, et al.,

Defendants.

Civil Action No. 6:10-cv-473

JURY TRIAL DEMANDED

OPPOSITION TO ERICSSON'S JMOLs

Pursuant to Federal Rule of Civil Procedure 50(a), Defendants D-Link Systems, Inc., NETGEAR, Inc., Acer America Corporation, Acer, Inc., Gateway, Inc., Dell Inc., Toshiba America Information Systems, Inc., and Toshiba Corporation, and Intervenor Intel Corporation (collectively, “Defendants”) respectfully request that the Court deny plaintiff Ericsson Inc.’s and Telefonaktiebolaget LM Ericsson’s (collectively, “Ericsson”) motion for judgment as a matter of law (“JMOL”) on all of its claims.

ARGUMENT

JMOL is appropriate on a given issue when, taking the record in the light most favorable to the non-moving party, a “reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” *Mirror Worlds, LLC v. Apple, Inc.*, 784 F. Supp. 2d 703, 710 (E.D. Tex. 2011) (quoting Fed. R. Civ. P. 50 (a)). Here, Ericsson has not met its burden as it has set forth no facts, let alone legally sufficient ones, on which a jury could rule in its favor.

A. Ericsson’s JMOL Nos. 1-3 (Invalidity of the ’568, ’215 and ’223 Patents)

Before trial commenced, the parties had agreed to drop their validity contentions on the ’223, ’215, and ’568 Patents. At trial, the parties kept their respective end of the agreement, and neither side put these issues before the jury. Consequently, the record does not constitute a legally sufficient evidentiary basis for the jury to decide on the validity contentions in regards to the ’223, ’215, and ’568 Patents. Accordingly, because Defendants and Ericsson agreed not to contest the validity of the ’223, ’215, and ’568 Patents, the Court should render Ericsson’s JMOLs 1, 2, 3 as moot.

B. Ericsson’s JMOL Nos. 4 and 5 (Invalidity of the ’435 and ’625 Patent)

Ericsson seeks JMOL claiming that “Defendants failed to prove by clear and convincing evidence that the Petras ETSI Submission (DX-120) met each and every element” of the asserted claims of the ’435 and ’625 patents. (Dkt. 490 at 3 and 4.) This bare assertion fails to carry

Ericsson's burden. *See, e.g., Orion IP, LLC v. Mercedes-Benz USA, LLC*, 2008 WL 5378040, *2 (E.D. Tex. Dec. 22, 2008) ("vague pre-submission motion, which failed to specify any legal basis, was not sufficiently specific" under Rule 50(a)). Even if it did, Defendants have presented substantial evidence that would compel a jury to find the '435 and/or '625 patents invalid, in view of the prior art and incorporate by reference their motion for JMOL on Invalidity of the '435 and '625 Patents ("Invalidity JMOL"). Dkt. 493. Indeed, as set forth therein, the Court should grant JMOL of invalidity in Defendants' favor in view of the clear and convincing evidence presented by Defendants.. Accordingly, the Court should deny Ericsson's JMOLs No. 4 and 5 and grant Defendants' JMOL on Invalidity of the '435 and '625 Patents.

C. Ericsson's JMOL No. 6 (Damages)

Ericsson seeks JMOL that "the appropriate damages in this case are 50 cents per unit." (Dkt. 490 at 4.) Ericsson sets forth no facts or law in support of this claim and thus has failed to properly raise this issue under Rule 50(a). *Orion*, 2008 WL 5378040, *2. Moreover, even if it had, Defendants have presented substantial evidence showing that Ericsson's requested royalty rate is unfounded and incorporate by reference their JMOL and Renewed JMOL on Damages. Dkt. 489; Dkt. 494 (renewed). Indeed, as set forth therein, the Court should grant JMOL of no damages in Defendants' favor in view of the compelling evidence presented by Defendants.

Ericsson further asserts that it is entitled to JMOL because "[d]efendants' damages theory improperly disregards the numerous real world licenses covering the patents in suit." Dkt. 490 at 4. As explained in Defendants *Daubert* motion, their motions *in limine* and their JMOL motions, all of which are incorporated herein by reference, none of the license agreements Ericsson relied on at trial are comparable to the hypothetical negotiation and are thus irrelevant. In addition, Ericsson further asserts that Defendants' lump sum damages model is improper. Yet it is well-established that a lump-sum award is an appropriate alternative to a running royalty. *LinkCo*,

Inc. v. Fujitsu Ltd., 232 F. Supp. 2d 182, 188 (S.D. N.Y. 2002); *see also*, *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009); *Personal Audio, LLC v. Apple, Inc.*, 9:09CV111, 2011 WL 3269330, *4-5, *11 (E.D. Tex. Jul. 29, 2011). Defendants have presented substantial evidence—including the testimony of its damages expert, Dr. Ray Perryman, and the parties own licensing agreements, *see, e.g.*, DX-101, PX-31 and PX-37—showing that a lump sum royalty is appropriate. Accordingly, there is substantial evidence supporting Defendants damages model and the Court should deny Ericsson’s JMOL No. 6 and grant Defendants’ JMOL on Damages instead.

D. Ericsson’s JMOLs No. 7-11, and 14

Ericsson’s JMOLs on Defendants equitable defenses are improper because such equitable defenses are not for the jury to decide. *See, e.g., Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm’n*, 430, 459 U.S. 442 (1977). A hearing on any of the issues in regards to Defendants’ equitable defenses would go to a bench trial proceeding in a court of equity, not a jury trial. For that reason, Ericsson’s JMOLs No. 7-11 and 14 should be denied.

E. Ericsson’s JMOL Nos. 12 (Standing) and 13 (Exhaustion)

Defendants have not contested Ericsson’s standing or asserted patent exhaustion at trial. Thus the Court should deny these as moot.

June 13, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on June 13, 2013.

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